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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 141

JOHN JOSEPH KILLIAN

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 37–55) is reported at 275 F. 2d 561. The prior opinion of the Court of Appeals (Pet. App. 28–36) is reported at 246 F. 2d 77.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 56) was entered on January 11, 1960. A petition for rehearing was denied on April 13, 1960. On May 4, 1960, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to June 12, 1960.

The petition was filed on June 11, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support a conviction for violation of 18 U.S.C. 1001, the "False Statements" statute.

2. Whether Section 9(h) of the Labor Management Relations Act (29 U.S.C. 159 (h)) and 18 U.S.C. 1001, as here applied, are constitutional.

3. Whether the court properly instructed the jury as to (a) membership in and affiliation with the Communist Party, (b) the terms "knowingly" and "willfully", as used in 18 U.S.C. 1001, and (c) the weight that might be given to the fact that a prosecution witness had been a paid informer.

4. Whether the Government's production of witnesses' statements complied with 18 U.S.C. 3500.

5. Whether the prosecutor's closing summation to the jury was prejudicial.

STATUTES INVOLVED

The statutes involved are 18 U.S.C. 1001, 29 U.S.C. 159(h), and 18 U.S.C. 3500. These appear at Pet. App. 25–27.

STATEMENT

Petitioner was charged, in a two-count indictment, with making a false statement in an affidavit of non-Communist Union Officer filed with the Regional Office of the National Labor Relations Board on December 11, 1952. Section 9(h) of the Labor Man-

agement Relations Act, 29 U.S.C. 159(h),[1] provided that the Board should make no investigation of a complaint by a labor organization unless each officer of the organization had on file with the Board an affidavit that he was not a member of, or affiliated with, the Communist Party. The statute makes the provisions of 18 U.S.C. 1001 (the "False Statements" Act) applicable to such affidavits.

An earlier conviction on the same charge was affirmed by the Court of Appeals, *United States* v. *Killian*, 246 F. 2d 77 (C.A. 7), but on rehearing that court reversed on the authority of *Jencks* v. *United States*, 353 U.S. 657. *United States* v. *Killian*, 246 F. 2d 77, 82. A second trial also resulted in a verdict of guilty on both counts, and the Court of Appeals again affirmed. *United States* v. *Killian*, 275 F. 2d 561 (C.A. 7). Petitioner was sentenced to five years' imprisonment on Count I and three years on Count II, the sentences to run concurrently.

Petitioner was a member of the executive board of Local 1111, United Electrical, Radio & Machine Workers of America. A special meeting of the officers of the Local was held on December 9, 1952, for the purpose of having the officers execute Union non-Communist affidavits together (Tr. 104, 120).[2] As each officer came into the office, he was given a copy of

[1] This section was repealed by 73 Stat. 519, approved September 14, 1959.

[2] On the face of the form, just below the title, appears the following, "See Instructions on the reverse side" (G. Ex. 1-L). These instructions provide information as to who must file and the procedure to be followed.

the affidavit, NLRB Form 1081, told to read it and then sign it and list his current address (Tr. 104, 116–117, 132).[3] As each officer signed his affidavit, it was notarized and placed in a stack with the affidavits which had previously been executed and notarized (Tr. 103, 118, 157). The completed affidavits were then placed in an envelope in the presence of, or under the direction of, the president of the Local and mailed to the National Labor Relations Board (Tr. 105, 119–120).

Upon receipt of the affidavits at the Chicago Regional Office of the National Labor Relations Board on December 11, 1952, the compliance officer checked them for completeness and to insure that each officer of the local union had executed an affidavit (Tr. 9, 12, 19–20, 25–26; G. Ex. 1–B, 1–U). Local 1111 was thereupon notified that it had complied with the Act and could avail itself of the facilities provided by the Board (Tr. 18–19; G. Ex. 1–A).

The Government's evidence as to petitioner's membership in the Communist Party covered the period 1949–53 and may be summarized briefly as follows:

Government witness Robert B. Fensholt testified that he became a member of the Communist Party while attending the University of Wisconsin (Tr. 159–161). He attended his first Party meeting in October or November 1949 (Tr. 164), when he was introduced to fellow members in the Party cell to which he had been assigned (Tr. 165). Among those

[3] "Tr" references are to the typewritten transcript filed with this Court.

Party members was petitioner, whom Fensholt had known previously (Tr. 165–166).

Petitioner was a member of the Student Branch of the Dane County Communist Party, a group composed of students on the University of Wisconsin campus, in October 1949 (Tr. 166–167). Meetings were held three or four times a month and petitioner regularly attended. Several meetings were held at petitioner's apartment (Tr. 166).

In late October 1949, Government witness Robert E. Sullivan, who had joined the Communist Party at the request of the Federal Bureau of Investigation (Tr. 368), transferred his Party membership from Cincinnati, Ohio, to Madison, Wisconsin (Tr. 305, 306–307). After identifying himself, by secretive means, to Andrew Remes, Wisconsin State Chairman of the Communist Party, Sullivan was told that he would be contacted by someone in Madison (Tr. 306–307). In December 1949, Sullivan received a note requesting him to contact petitioner, after which a meeting was arranged (Tr. 309). At this meeting, petitioner identified himself as the section organizer for the Party in Madison (Tr. 310).

Sullivan testified that at a Communist Party meeting held in Madison in 1950, at which petitioner was present, Remes stated, in answer to a question, that one could be a Party member without revealing his membership in an application for Federal employment because the Party could "impose security measures on him" (Tr. 317–322).

By January 1950, petitioner had attained such a position of prominence in the Communist Party that

he could reassign Sullivan and five or six of the older Party members to the downtown group (Tr. 326–327). He was sufficiently well informed about Party activities to tell Sullivan that Remes was going to be replaced as State Chairman for Wisconsin because of a desire on Remes' part to concentrate on industry (Tr. 327).

Government witness Michael J. Ondrejka testified that he joined the Communist Party at the request of the Federal Bureau of Investigation in October 1949 and that he remained a member of the Party until November 1953 (Tr. 408–409).

In the middle of November 1951, Ondrejka testified, a closed Party meeting was held at petitioner's house (Tr. 424–425). Petitioner stated that the purpose of the meeting was to form a Party cell at the Allen-Bradley plant. One of the purposes of the cell was to cultivate social contacts with workers of the plant in order to recruit them into the Party (Tr. 425–426). Petitioner told Ondrejka that it was important that they both become stewards in the shop (Tr. 427). Subsequently, both did become stewards in the shop and attended stewards' meetings together (Tr. 428–429). In the Fall of 1952, petitioner, while engaged in distributing political and union leaflets, would stop at Ondrejka's machine and discuss Party affairs (Tr. 430–431).

A Communist Party meeting was held at petitioner's home in February 1953, attended by Jerry Rose and Ted Silverstein, the South Side Section Leader and Youth Coordinator, respectively, of the

Communist Party of Milwaukee (Tr. 433–434). Rose said that the Party was well pleased with the work that petitioner and Ondrejka had been doing for the Party in the Allen-Bradley plant during the past several months (Tr. 435). He stated that there was a need to coordinate the activity of petitioner and Ondrejka, who had been working in an individual fashion, and that a new Allen-Bradley Party branch was to be formed to place them under tighter Party direction and guidance (Tr. 435). Rose suggested that petitioner be made chairman of the group because it would be easier for Rose to meet with petitioner and discuss the agenda (Tr. 435–436).

There was also evidence that petitioner, as a member of the Party, attended subsequent meetings in 1953 (Tr. 439, 447–454).

ARGUMENT

1. (a.) The evidence unquestionably warranted the jury's inference that petitioner was a member of the Communist Party on December 11, 1952, as well as on prior and subsequent dates.

There was evidence that petitioner about November of 1951 undertook to form a cell of the Communist Party at the Allen-Bradley plant, and proposed that he and Ondrejka become stewards in the plant in order to make the cell more effective (Tr. 424–428). In the Fall of 1952, he frequently stopped at Ondrejka's machine and then he would "discuss Communist Party affairs" (Tr. 430–431).

Petitioner's affidavit was filed on December 11, 1952. Shortly thereafter, in February 1953, a Party

meeting was held at his home, and attended by two officials of the Communist Party of Milwaukee. These officials praised the work which petitioner and Ondrejka had been doing at Allen-Bradley "during the past several months" (Tr. 435). Also, Ondrejka testified that he knew that petitioner was a Party member from April 1951 through August 1953 (Tr. 410–414).

On these facts, "the time element and other factors" made the inference of petitioner's membership on December 11, 1952, a compelling one. See *Maggio* v. *Zeitz*, 333 U.S. 56, 65; *Hupman* v. *United States*, 219 F. 2d 243, 248 (C.A. 6), certiorari denied, 349 U.S. 953.

(b.) Petitioner attacks the credibility of Ondrejka, "the single uncorroborated witness", apparently referring to the period 1952–1953. See Pet. 2, 12.[4] But the credibility of witnesses is peculiarly within the competence of the judge and jury who hear the witnesses and observe their demeanor. *Glasser* v. *United States*, 315 U.S. 60, 77.

In a case where the question is membership in an organization which operates covertly, testimony of informants is frequently a necessary part of the prosecutor's case and the use of such testimony is altogether proper. See *United States* v. *Dennis*, 183 F. 2d 201, 224–225 (C.A. 2), affirmed, 341 U.S. 494; *On Lee* v. *United States*, 343 U.S. 747, 756–758; *Caminetti* v. *United States*, 242 U.S. 470, 495–496.

[4] Petitioner does not now contend that the two-witness perjury rule is applicable.

The trial court explicitly instructed the jury that the fact that a witness had been a confidential and paid informant for the Federal Bureau of Investigation could be considered, together with all other facts, in determining the weight to be given his testimony (Pet. 60). Certainly, there was no need to phrase the cautionary instruction in words of petitioner's choosing.

(c.) The evidence establishes that petitioner's false affidavit was made in a matter "within the jurisdiction of [an] agency of the United States," and that the falsehood went to a "material" fact.

There is no dispute that petitioner was an officer of a local union and that under Section 9(h) a local could not avail itself of the facilities of the Labor Board unless all its officers filed "non-Communist" affidavits. Petitioner executed such an affidavit and it was filed. No reason has been suggested why he should execute such an affidavit, true or false, except to obtain for his union the advantages resulting from compliance with the requirements of the Act. In all events, the result of the filing of affidavits by petitioner and the other officers was that the Board's compliance officer made a check to determine that all of the officers had filed and that he then advised the Local that it was in compliance. Thereupon the Board was bound to allow petitioner's Local the use of the facilities of the Board, even if it should later determine that one or more of the affidavits filed was false. *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U.S. 145; *Amalgamated*

Meat Cutters and Butcher Workmen v. *National Labor Relations Board*, 352 U.S. 153.

Since official action—making the facilities of the Board open and available to the Union—was induced, the offense was complete. It is immaterial whether the Union had occasion to avail itself thereafter of the opportunity which it assured to itself by complying with Section 9(h). "It does not lie with one knowingly making false statements with intent to mislead the officials of the Corporation [Board] to say that the statements were not influential * * *," *Kay* v. *United States*, 303 U.S. 1, 5–6. And see *United States* v. *Gilliland*, 312 U.S. 86, 93; *United States* v. *Leviton*, 193 F. 2d 848, 851 (C.A. 2), certiorari denied, 343 U.S. 946; *Weinstock* v. *United States*, 231 F. 2d 699, 701–702 (C.A.D.C.).

2. Petitioner's attack upon the court's charge to the jury (Pet. 14–16) is without substance.[5]

As to the terms "knowingly" and "willfully," the court instructed (Tr. 675);

> You will note that the acts charged in the indictment are alleged to have been done "knowingly" and "willfully". The word "knowingly" means to act voluntarily and purposely and not because of a mistake or inadvertence or other innocent reason. The word "willfully" means to act voluntarily and purposely and with the intent to do that which the law forbids.

In addition, the court charged that the "fundamental issue of fact" was whether the petitioner "knowingly and willfully used an affidavit which was false and which he knew to be false at that time" (Tr. 703).

[5] We have discussed above (p. 9) the cautionary instruction regarding informer testimony.

The jury was thus fully advised that the question was "whether the affiant acted in good faith or knowingly lied". This was a sufficient instruction as to the required "specific intent". *American Communications Assn.* v. *Douds*, 339 U.S. 382, 413.

The instructions as to membership were also proper. The court carefully explained that, in order to find petitioner guilty, the jury had to find that at the time alleged in the indictment the petitioner knew that the affidavit was false; and that he could not be convicted on the basis of *past* membership (or affiliation) (Tr. 703). Membership, the court charged, "connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member" (Tr. 704). The court then went on to describe twelve categories of evidence the jury might take into account in determining whether the petitioner intended to be a member of the Party, *e.g.*, evidence as to the payment of dues, attendance at meetings, subjection to Party discipline, acting on behalf of the Party and willingness to carry out Party plans (Tr. 705–706).

There is nothing in the charge inconsistent with the decision of this Court in *Galvan* v. *Press*, 347 U.S. 522, 528–529, with the concurring opinion of Mr. Justice Burton in *Jencks* v. *United States*, 353 U.S. 657, 678–679, or with the opinion in *Fisher* v. *United States*, 231 F. 2d 99, 107 (C.A. 9). The charge properly emphasized the essential fact that membership is a consensual matter.

As to "affiliation," the charge referred to "a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis" (Tr. 679). This also accords with the opinions in *Jencks*, and *Fisher*, *supra*.[6]

3. Petitioner's contentions as to the interpretation and application of 18 U.S.C. 3500 relate to two classes of documents: (1) the receipts given to the F.B.I. by Government witnesses Sullivan and Ondrejka for payments received; (2) statements by government witnesses relating to "policies, activities and program of the Communist Party" (Pet. 18-22).[7]

Sullivan and Ondrejka testified on cross-examination that they were paid by the F.B.I., and that receipts were given, or notes of the payments made by the agent (Tr. 370-376, 500-507). They also testified to the amounts they received. In addition, the government offered to submit to the defense a schedule of the payments made to Sullivan and Ondrejka, and the defense rejected the offer (Tr. 550-552). In these circumstances, petitioner can hardly claim that prejudice resulted from the fact that he did not see

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[6] Since concurrent sentences were imposed, petitioner of course must show that the instructions as to both membership and affiliation were defective. *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642.

[7] The petition raises no question as to the production of grand jury minutes, although the point was argued below.

the receipts themselves. Cf. *Rosenberg* v. *United States*, 360 U.S. 367, 370.

Petitioner's demand for all statements of Government witnesses relating to Communist activities was clearly too broad; Section 3500 calls for the production of statements which relate to the direct testimony of the witness. *Palermo* v. *United States*, 360 U.S. 343, 349. Both Sullivan and Ondrejka reported to the F.B.I. on matters not involving the petitioner (Tr. 376, 511), but what the petitioner demanded was *all* of their statements.[8]

4. Petitioner suggests (p. 10) that the summation of the prosecutor was improper in that the attorney gave what amounted to unsworn testimony.[9] The statement in question is obscure and petitioner does not even attempt to show how it could have influenced the jury in any way. Certainly it was not inflammatory. Cf. *Viereck* v. *United States*, 318 U.S. 236, 247–248. Moreover, the trial court carefully instructed the jury that the arguments and statements of counsel were not evidence (Tr. 681).

5. Petitioner also argues (pp. 16–17) that the court's charge left the membership question so vague as to permit a conviction on the basis of nothing

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[8] The Court of Appeals noted (Pet. App. 51) that the Government produced statements having only a remote relationship to the direct testimony, and that the trial court, in excising the statements, acted with liberality to petitioner.

[9] The statement (referring to Ondrejka) was: "He was married. The question was asked: 'You do not know what the answer is, and do not assume that you know.' We know. We talked about it out of your presence" (Tr. 665).

more than constitutionally protected speech or association, thus contravening the First Amendment. As we have already pointed out (*supra*, pp. 10–11), the court properly instructed the jury as to the required "specific intent." There is nothing in petitioner's contention that is not covered by the decision of this Court in *American Communications Assn.* v. *Douds*, 339 U.S. 382.

CONCLUSION

The petition for a writ of certiorari should be denied.

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